

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RANDY H. PELLOWITZ,)
)
 Plaintiff)
)
 v.) Civil No. 03-122-P-S
)
 POSTAL SERVICE, et al,)
)
 Defendants)

RECOMMENDED DECISION ON CIVIL COMPLAINT

Randy Pellowitz has brought a complaint under the Federal Tort Claims Act and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). (Docket No. 1.) He has also filed a motion to proceed in forma pauperis which I now **GRANT**. With respect to the complaint, I recommend that the Court **DISMISS** the complaint pursuant to 28 U.S.C. § 1915A(b).

Allegations

Pellowitz's allegations in this complaint pertain to a search of his premises and a trailer in Bridgton, Maine, an execution on a safe deposit box, and the missing contents of a brief case. He states that his former attorney has informed him that United States Probation Officer, Matt Brown, and United States Postal Inspector Kevin Stack traveled to Bridgton, Maine and entered property – including a building and vehicles -- under the control or possession of Pellowitz.¹ They also seized items. They were not acting under

¹ I treat this complaint with respect to damages as only running against the named individual defendants; the United States Supreme Court has held that Bivens damage actions do not lie against Federal agencies. F.D.I.C. v. Meyer, 510 U.S. 471, 486(1994). If Pellowitz is not entitled to equitable relief vis -à-vis the agents, he is not entitled to equitable relief from the agencies.

the authority of a warrant. Pellowitz believes that the pair searched and seized property without a warrant on a number of occasions. Pellowitz claims that, contrary to sworn statements on his part, Stack has knowledge of the status of a twenty-four foot trailer that he removed from the property without a warrant. Pellowitz believes that Stack has knowledge of the disposition of other property as well.

With respect to the safe deposit box, Pellowitz states that Stack received an order of execution relating to the box located at a Biddeford credit union as part of his criminal case. Pellowitz had agreed to a forfeiture of his bank accounts but this box, containing personal items, was never discussed and forfeiture was never agreed to. The status of the box is unknown to Pellowitz. Pellowitz claims that he was never given notice of intent by the government to execute on the box.

Pellowitz alleges that a briefcase was seized by Stack from Rodger Goodoak. This briefcase had a combination lock, the numbers of which were known only to Goodoak and Pellowitz. Pellowitz claims that Stack kept the briefcase for four months and when he returned it to Pellowitz's parents "a large portion of critical documents were taken by Stack as well as postage stamps in excess of a value of \$100.00." Pellowitz accuses Stack of lying when he denied the removal of any items.²

With respect to the individual defendants, Pellowitz states his intent to name further individuals involved in the seizure "yet undisclosed by the government." However, there is no allegation in the complaint related to conduct of agents other than Stack and Brown. Given that these two are the only 'actors' in the allegations, this is not the type of complaint that would warrant allowing the action to go forward against unnamed defendants in the expectation that discovery will yield their identities later.

I recognize that Pellowitz has expressly named Probation Officer Mark Brown in this complaint and alleges that he accompanied Stack on the initial search of the Bridgton property. However, there is no allegation that Brown seized any property or took and retained custody of any property. Pellowitz continues to attribute this conduct to Stack.

² Pellowitz further faults Stack for the statement he made to Pellowitz's estranged wife and neighbors about Pellowitz's penchant for "stealing from everyone." This amounts to harassment and defamation in Pellowitz's view. If this claim has any merit at all it is a state law claim and would not be the kind of claim vis -à-vis which the principles of pendant jurisdiction would warrant keeping this claim alive, alone, in the federal forum.

With respect to remedies, Pellowitz seeks a full accounting of any and all the items seized by law enforcement or governmental agents and a description of their location; an immediate aggregate payment of \$5,000,000.00 in punitive and compensatory damages; notification of the location of the safe deposit box, a retraction of any order of execution vis-à-vis the safe deposit box, and the immediate return of any items seized there from; and a status report on the balance of the missing contents of the “briefcase.”

Prior Litigation of these Issues

Attached to the complaint is a sheath of pleadings, with which this court is familiar, relating to Pellowitz’s motion in his criminal case for the return of property and disclosure. In that pro se motion naming a United States Assistant Attorney, Stack, and the Department of Justice, Pellowitz sought a court order for the return of the briefcase and its contents, as well as the disclosure and turnover of any property taken by (in essence) any agent of the United States government. Pellowitz complained that there was no warrant or other authorization pursuant to which the property was seized.

The United States responded, understanding the motion to be pursuant to Federal Rule of Criminal Procedure 41. The United States indicated that Stack had sworn an affidavit stating that he had returned the briefcase to the address designated by Pellowitz and that he had no other property belonging to Pellowitz in his possession. The affidavit also stated that Stack was not aware of any other federal law enforcement agency that, during the criminal investigation, obtained possession of property owned or claimed by Pellowitz.

Pellowitz’s motion for turnover was denied. Pellowitz then filed a traverse to the

United States' response that was treated as a motion for reconsideration of this denial. Therein, Pellowitz indicates that the briefcase and laptop computer were returned by Stack. However he sought sanctions for the delay between a July 2001 letter by the government committing itself to the return of the items and the November 2001 receipt of the property. He also sought remuneration on the grounds that the laptop functioned when seized but did not operate when his parents received it back. Pellowitz alleged that several documents, several photographs, a disposable camera with personal undeveloped photographs, and other yet to be disclosed items were missing from the locked briefcase. He alleged that on many occasions the government, including the probation department, directed businesses to Pellowitz's properties in Casco and Bridgton to remove chattels and goods, as well as entering these properties itself, without warrant.

The laptop computer, Pellowitz explained, was in the locked trailer on the Bridgton property and Pellowitz sought an account of how the government came into possession of it. This concern raised questions for Pellowitz as to the whereabouts of the remaining contents of the trailer, the trailer itself, items stored in the boat in Bridgton, the boat itself, the contents of the storage shed, lumber, and roofing materials. With respect to the briefcase, Pellowitz noted that only Goodoak and Pellowitz knew of the combination and he suggested that obstruction charges should be lodged against Stack and Goodoak for tampering with and removing items from the briefcase. In this pleading he sought damages.

The United States responded, again including an affidavit by Stack responding to Pellowitz's additional factual assertions. This response explained that in the fall of 2000 Stack received a call from Edwin Rolf who told Stack that Rolf had allowed Pellowitz to

leave a trailer in Rolf's gravel pit. Stack went with Rolf to the site and the trailer was there with the lock broken. In the trailer Stack found a black computer attaché which was locked. Stack never opened this bag and returned it to Pellowitz's agent. It was Goodoak that contacted Stack about the briefcase. Goodoak had received a call from Pellowitz from the Cumberland County Jail with a request that he pick up the briefcase from Pellowitz's wife. Goodoak gave the briefcase to Stack and Stack returned it to Pellowitz. Stack swore he knew of no other Pellowitz property in the custody of his or any other law enforcement agency. The motion for reconsideration was denied.

On appeal, The First Circuit Court of Appeals affirmed the denial of the original motion, concluding that Pellowitz had requested the return of property and that property had been returned. It did not address the arguments made vis-à-vis the motion for reconsideration because Pellowitz had not made a timely appeal of that denial. The court noted that an evidentiary hearing was not required because Pellowitz had not made a sufficient showing that a warrantless search had occurred. (Cr. 00-89-P-C Docket No. 58.)

Discussion

While it is true that “[a] defendant may bring an independent civil action for the return of property even if the underlying criminal case has been closed,” United States v. Guzman, 85 F.3d 823, 830 (1st Cir. 1996) (citing United States v. Garcia, 65 F.3d 17, 19-20 (4th Cir.1995), United States v. Giraldo, 45 F.3d 509, 511 (1st Cir.1995), and United States v. Giovanelli, 998 F.2d 116, 118-19 (2d Cir.1993)), such a complaint is the functional equivalent of a Rule 41(e) motion. Id. See also 28 U.S.C. § 1346; Giovanelli, 998 F.2d at 119 (“Where criminal proceedings are no longer pending against the

defendant such motion is treated as a civil equitable proceeding even if styled as being pursuant to Fed.R.Crim.P. 41(e).”); Onwubiko v. United States, 969 F.2d 1392, 1397 (2d Cir. 1992) (“Where criminal proceedings against the movant have already been completed, a district court should treat a [R]ule 41(e) motion as a civil complaint.”). In Geraldo the First Circuit concluded that jurisdiction over such post-conviction civil actions was proper under 28 U.S.C. § 1331. 45 F.3d at 511 (citing Onwubiko).

Pellowitz has already sought the relief he seeks here, including damages, during the pendency and in the aftermath of his criminal proceedings. This is true of his claims concerning the briefcase and its contents, the computer, the trailer and its contents, and the catch-all request for disclosure of the property seized by the defendants. As a consequence, I cannot but conclude that the prior determination by this Court and the First Circuit on the initial motion for turnover and by this Court on the motion for reconsideration of the denial of that motion (that was never appealed) preclude Pellowitz from resurrecting these claims again in a civil suit against federal agencies or federal agents after this Court and the First Circuit have determined there was no merit to his turnover claims.³

The only new, sufficiently detailed claim concerning the turnover of property relates to the execution on the safe deposit box. Pellowitz claims he has just recently learned of the execution. However, the court’s file shows that the United States followed a notice of garnishment with a motion for a writ of execution with respect to this box on

³ It appears to be an open question as to whether a defendant could get damages under Rule 41. See, e.g., United States v. Jones, 225 F.3d 468, 470 (4th Cir 2000) (We therefore agree with the Third and Fifth Circuits that courts lack jurisdiction to award damages under Rule 41(e).”). The First Circuit intimated no opinion on the question in an unpublished decision. See United States v. Cintron Moreno, 2001 WL 288616, *2 (1st Cir. 2001). However, this case does not require the Court to take a stab at answering the question because Pellowitz would only be entitled to damages if his claims had merit and this Court and the First Circuit have already concluded they are without merit.

April 10, 2001. (Cr-00-89-P-C Docket No. 26.) The writ was executed on April 10, 2001, replete with a detailed notice to Pellowitz about his rights. This was just over a month after judgment entered against Pellowitz. Not only has Pellowitz failed to allege that he did not receive that notice, I cannot credit his self-serving assertion that over the last two plus years, during which he has been actively litigating concerns about the turnover of his property, he never had access to the docket entries relating to the execution. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990) (deferential reading of complaint does not require the crediting of “bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation.”); id. at 53 (“We have frequently recognized that, in cases where civil rights violations are alleged, particular care is required to balance the liberality of the Civil Rules with the need to prevent abusive and unfair vexation of defendants.”). A further reason that this claim is not viable is that Pellowitz admits that he is on a fishing expedition as he acknowledges that he cannot specify what, if any, items are missing from the box.⁴

Conclusion

For these reasons this complaint should be dismissed because there is no relief that can be granted to Pellowitz on his revived turnover claims, see 28 U.S.C. § 1915A(b) and, accordingly, I recommend that the Court **DISMISS** the complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum,

⁴ Although I in no way base my recommendation on this point, it does seem highly likely to me that should this complaint be allowed to proceed and the defense be raised a governmental agent executing the court-authorized writ would be entitled to qualified immunity forthwith even if the writ of execution order was improvidently issued.

within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

July 21, 2003.

Margaret J. Kravchuk
U.S. Magistrate Judge

PRISONERCIVILRIGHTS, BANGOR

**U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:03-cv-00122-GZS
Internal Use Only**

PELLOWITZ et al v. PROBATION, US et al

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 42:1983 Prisoner Civil Rights

Date Filed: 05/27/03

Jury Demand: None

Nature of Suit: 550 Prisoner: Civil Rights

Jurisdiction: Federal Question

Plaintiff

RANDY H PELLOWITZ

represented by **RANDY H PELLOWITZ**

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FORT DIX, NJ 08640

PRO SE

V.

Defendant

US POSTAL SERVICE

PROBATION, US

USA

POSTAL INSPECTION SERVICE

**KEVIN STACK, *POSTAL
INSPECTOR***

**MATT BROWN, *UNITED STATES
PROBATION OFFICER***